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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HYUNDAI MOTOR COMPANY,
HYUNDAI MOTOR AMERICA and
CENTRAL HYUNDAI COMPANY,
Petitioners,

v.

EVELYN PHILLIP,
as Personal Representative of the
Estate of Ann Marie Phillip, deceased,
Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

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PETITIONERS' REPLY BRIEF

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INTRODUCTION

The lower court found no preemption of plaintiff's FMVSS 208 claim based on *Myrick v. Freuhauf, Inc.*, 13 F.3d 1516 (11th Cir. 1993), *cert. granted*, 115 S. Ct. 306 (1994). Petition for Writ of Certiorari ("Pet.") at 7.[1] *Myrick* violates 200 years of precedent, and review of *Phillip* is proper for all the reasons it was proper in *Myrick*. Indeed, another appellate court has just declined to consider implied preemption, based on *Myrick*. *Hernandez-Gomez v. Volkswagen of Am.*, 1994 WL 593202 (Ariz. Nov. 1, 1994).

Plaintiff does not defend *Myrick*'s ban on implied preemption analysis. And she concedes that "Congress allowed options in lieu of mandatory airbags;[2] liability predicated only on a manufacturer's exercise of the very choice Congress granted would be improper." Opp. at 19. But she tries to avoid preemption here, urging a procedural bar that does not exist and recasting her claim in ways belied by the record.

Plaintiff's claim directly conflicted with, and took away, an FMVSS 208 option that NHTSA found necessary to serve safety. The lower court relied on *Myrick* in finding no preemption despite that direct conflict. The Court should grant review here, just as it did in *Myrick*.

ARGUMENT

I. THIS COURT HAS JURISDICTION.

Plaintiff argues that the decision below was not "rendered by" the "highest court of [Florida] in which a decision could be had." Opp. at 1 (citing 28 U.S.C. § 1257(a)). Plaintiff is wrong.

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[1] We refer to the record, the parties and the statutes and regulations as in Hyundai's Petition. Phillip's Brief in Opposition is "Opp." We again refer to state common-law claims that would remove an FMVSS 208 option as "FMVSS 208" claims.

[2] That is, of course, incomplete. Congress did grant the option to install seatbelts instead of airbags. It also granted the option to install airbags instead of passive seatbelts, and to install passive two-point belts "in place of" passive belts that include a lap belt. 49 C.F.R. § 571.208, S4.1.2-S4.1.4, S4.5.3.

Plaintiff agrees that the District Court of Appeal did not certify that the preemption issue is a matter of "great public importance." Opp. at 2. Thus, the Florida Supreme Court had no jurisdiction to review the case on that ground, for "[c]ertification is a condition precedent to any review [by the Florida Supreme Court] on that ground." *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 596 (1961). *See* Fla. R. App. P. 9.030(2)(A)(v).

Plaintiff argues, however, that Hyundai should have asked the District Court of Appeal to certify the question after it had declined to do so itself. This Court has already rejected that argument. In *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967), the Court held that the District Court of Appeal was, in our setting, the court of last resort in Florida. Citing *Whitaker v. Jacksonville Expressway*, 131 So. 2d 22 (Fla. Dist. Ct. App.), *cert. denied*, 133 So. 2d 319 (Fla. 1961), this Court held that although "litigants may file a suggestion that a particular question be certified, such suggestion has been declared to have 'no legal effect.'" *Nash*, 389 U.S. at 237 n.1. Thus, the Court reasoned, "[I]t is impossible . . . to say that under Florida law petitioner had any right to call upon the State Supreme Court for review." *Id.*

That is this case. Hyundai could have asked the District Court of Appeal to certify the issue as a "matter of public importance," but the request would have no "legal effect" because, as *Whitaker* explains, the court always decides on its own whether a case should be certified:

> Inherent in every decision rendered by a District Court of Appeal is the implication, unless otherwise stated or contrary action taken, that it *does not* pass upon a question of great public interest. . . .

131 So. 2d at 23 (emphasis added). Thus, in Florida, a certification request is like a request for reconsideration of a matter already decided; requests for reconsideration are never a prerequisite for jurisdiction here. *Southern Ry. Co. v. Clift*, 260 U.S. 316, 318-19 (1922).

Plaintiff says *Nash* is no longer good law. When *Nash* was decided, she says, "the rules made no provision for a party to request certification," whereas now "Florida's appellate rules have been changed" and "specifically allow a party to ask the district court to certify an issue." Opp. at 4. Plaintiff is in error. *Whitaker* (the case *Nash* cites) held that "at any time prior to expiration of the time allowed for a petition for rehearing any interested party may file in a pending case a suggestion that the decision therein be certified." 131 So. 2d at 24. Thus, the procedures were the same then as now, and there is no basis to overrule *Nash*.[3]

Plaintiff argues that *Gotthilf v. Sills*, 375 U.S. 79 (1963), instead "controls." Opp. at 5. But *Gotthilf* was decided over dissent, and *Nash* was decided after *Gotthilf*. Moreover, nothing in *Gotthilf* suggests that in New York (the jurisdiction at issue), an intermediate appellate court's rejection of certification is "inherent in every decision," as it is in Florida.[4]

The Florida Supreme Court had no jurisdiction to review this case. This Court therefore has jurisdiction.

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[3] Indeed, when *Nash* was decided the Florida Supreme Court had broader jurisdiction than it has today. In March 1980, the Florida constitution was amended to expand the jurisdiction of the District Courts of Appeal, and restrict the jurisdiction of the Supreme Court, so that the District Court of Appeal would be the court of last resort in most cases. *See* Fla. Const., art. V, § 3(b).

[4] In any event, in *Myrick*, the Eleventh Circuit (which includes Florida) had already held that the Safety Act forecloses preemption claims with respect to any FMVSS. The District Court of Appeal thus followed the Eleventh Circuit decision. It would be difficult to argue, in good faith, that the preemption decision of the Florida court, which deferred to the Circuit in which it sat, presented a matter of great public importance **to Florida.** After all: (1) from Florida's perspective, the decision finding no preemption merely meant that Florida law applies in Florida; and (2) as to preemption, the Eleventh Circuit decision would stand whatever Florida courts did. The preemption issue does, however, present an issue of great public importance in this Court, for this Court has the power to (and will) review the Eleventh Circuit decision.

II. PLAINTIFF CANNOT CHANGE HER DEFECT THEORY, *POST HOC*, TO AVOID PREEMPTION.

Plaintiff concedes that FMVSS 208 granted manufacturers the right "to choose" among restraint system options, and that S4.5.3 of FMVSS 208 specifically granted the option to install a 2-point automatic belt system "in place of" a system with lap belts. 49 C.F.R. § 571.208, S4.1.2-S4.1.4, S4.5.3. Opp. at 18. She further does not dispute that NHTSA and the Secretary of Transportation judged that options, including the 2-point belt option, were the best way to meet the safety goal, and that mandating any single type of passive restraint "runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems." 49 Fed. Reg. at 29001 (1984).[5] Finally, she agrees that liability predicated "on a manufacturer's exercise of the very choice Congress granted would be improper." Opp. at 19. In fact, it is more than "improper;" it is unconstitutional, for state law that conflicts with federal law "is pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Rest. Emp. and Bartenders Int'l Union*, 468 U.S. 591, 501 (1984).

But, plaintiff protests, her claim did not seek to punish Hyundai's exercise of the 2-point belt option, instead of a system with a lap belt. Rather, plaintiff argues, she claimed only that Hyundai "defectively designed its two-point system." Opp. at 18. Thus, plaintiff proposes, the "no airbag" cases, and the *Myrick* decision that purports to supersede them, "do not apply here." Opp. at 19.[6]

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[5] *See also* Brief for the United States as Amicus Curiae Supporting Respondents, *Freightliner Corp. v. Myrick* (No. 94-286) (filed Dec. 13, 1994).

[6] Plaintiff also tries to distinguish the so-called "no airbag" cases by arguing that "[i]n the typical airbag case, the plaintiff was not wearing his seatbelt." Opp. at 19 n.11. "No airbag" claims are preempted because they take away the seat belt option; they do that whether plaintiffs used the belts or not. And, in fact, many "no airbag" plaintiffs wore their seat belts; their claims were still preempted. *See, e.g., Marrs v. Ford Motor Co.*, 852 S.W.2d 570, 572 (Tex. App.-Dallas 1993); *Surles v. Ford Motor Co.*, 709 F. Supp.

Plaintiff is playing with words. The first defect plaintiff identifies in the "two-point system" is "lack of adequate pelvic restraint." Opp. at 10-13, 15. "Pelvic restraint," of course, is a lap belt. Opp. at 7, 8-9, 10.[7] Indeed, the closing argument was devoted to the theory that the Hyundai's restraint system was defective because it did not have a lap belt; the other so-called theories—shoulder belt rigidity and web clamps—were never even mentioned. For example, plaintiff argued that the "knee bolster is no substitute for a lap belt" (R. Tr. 1506); that Hyundai should have told consumers that "if you want complete protection and not increase in injury you need a lap belt" (R. Tr. 1508); that the "industry standard" was to "put[] in a lap belt." (R. Tr. 1513-14) *See also* R. Tr. 1510, 1512, 1523, 1527, 1528. Even here, plaintiff argues that Hyundai "relied on the seat and padding on the lower dashboard to provide the lower body restraint *other systems and manufacturers provided with a lap belt.*" Opp. at 7 (emphasis added). And she complains that "restraint systems with a lap belt" were "safer than the shoulder-belt only system." Opp. at 13.

Thus, plaintiff's theory of defect was—and is—that the 2-point belt was defective because it was not a 3-point belt. That theory punishes the exercise of the 2-point belt option, takes that option away, accordingly conflicts directly with FMVSS 208, and so is preempted.[8]

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732 (N.D. Tex. 1988); *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio 1986). Quite a few cases also have found preempted the "no lap belt" claim plaintiff made here; since the 2-point belts were automatic, plaintiffs necessarily wore them. *See, e.g., Dykema v. Volkswagenwerk*, 1994 WL 621933 (Wis. App. Nov. 8, 1994); *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div.), *cert. denied*, —— A.2d —— (N.J. Oct. 19, 1994).

[7] Hyundai does not, as plaintiff suggests, agree that it "design[ed] and install[ed] an *admittedly* defective" restraint system. Opp. at 18 (emphasis added). Hyundai has always believed and said that the 2-point system is safe. (*E.g.*, R. Tr. 1566-69) Moreover, NHTSA, charged with setting standards that "meet the need" for safety (15 U.S.C. § 1392(a)), endorsed that system repeatedly.

[8] *See, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990) (citing *Fidelity Fed. Sav. & Loan*

Plaintiff's own authority, *Perry v. Mercedes Benz of N. Am., Inc.*, 957 F.2d 1257 (5th Cir. 1992), agrees. *Perry* concurred with "much of [the other circuits'] reasoning" on FMVSS 208 preemption, including "the conclusions of the other circuits that the Savings Clause does not preserve common law actions that would *actually conflict with*, or 'subvert,' the objectives and methods of the federal scheme." *Id.* at 1265 (original emphasis). *Perry* held that FMVSS 208 does not preempt a claim that challenges only the design of the FMVSS 208 option chosen, for such a claim does not require use of a different option. Hyundai has no quarrel with *Perry*. But plaintiff's claim is not a *Perry* claim. Plaintiff asked the jury to punish Hyundai for exercising an option that federal law determined was necessary to serve the safety goal, and the jury did so. This case fits squarely within the preemption findings of the FMVSS 208 case law, and the Court should review that Florida court's decision to follow *Myrick* instead of those cases.

III. FMVSS 208 IS THE ON-POINT FEDERAL STANDARD.

Plaintiff proposes that to preempt, a federal standard must relate to both the "aspect of performance" **and** the "item of equipment" as the state standard. Opp. at 25. Plaintiff argues that FMVSS 208 relates to restraint systems (the "item of equipment"), but not to abdominal restraint (the supposed "aspect of performance"). Thus, plaintiff concludes, there is no federal standard for her claim, which concerns abdominal injuries, to conflict with. Opp. at 25-26. That is, with respect, fanciful.

First, the Safety Act's preemption clause is disjunctive, not conjunctive. It preempts state standards not "identi-

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Ass'n v. de la Cuesta, 458 U.S. 141, 155 (1982)); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 787 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Miranda*, 647 A.2d 167; *Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App.), *rev. denied*, 510 N.W.2d 137 (1993); *Marrs*, 852 S.W.2d 570.

cal" to a federal standard as to the "same aspect of performance . . . **or** item of equipment." 15 U.S.C. § 1392(d) (emphasis added). "Or" means "or;" "or" does not mean "and." No case reads the preemption clause as plaintiff does. *See, e.g. Jordan v. Paccar, Inc.*, 792 F. Supp. 545, 550 (N.D. Ohio 1992) (non-identical state regulation is preempted "when a federal standard deals specifically with **a particular item or category of equipment**") (emphasis added).

Second, even if the preemption clause were conjunctive, FMVSS 208 and plaintiff's claim relate to both the same "aspect of performance" and the same "item of equipment." The Safety Act mandates the issuance of regulations concerning "aspects of performance" and/or "items of equipment" of vehicles, not people. 15 U.S.C. § 1392(d). The "aspect of performance" at issue in FMVSS 208 is "occupant crash protection," without limitation as to kind of crash or injury. 49 C.F.R. § 571.208, S.2. The items of equipment are "active and passive restraint systems," also without limitation as to kind of crash or injury. *Id.* Likewise, plaintiff's claims relate to the design of the vehicle, not the plaintiff. Her claims addressed occupant restraint and seat belt restraint systems—exactly the "aspect of performance" and "item of equipment" that FMVSS 208 covers.[9]

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[9] Plaintiff cites *Pokorny*, 902 F.2d at 1126, and *Chrysler Corp. v. Tofany*, 419 F.2d 499 (2d Cir. 1969), but neither supports her. *Pokorny* concerned a car's performance in a rollover; FMVSS 208 does not set "performance standards" for rollover tests. Nonetheless, the court found that plaintiffs could not require a different FMVSS 208 option than the one chosen. The court did allow a claim that the car should have had window netting, because FMVSS 208 did not cover that item of equipment, and a window netting requirement would not take away any FMVSS 208 option. *Pokorny*, 902 F.2d at 1126.

Tofany concerned a state's effort to outlaw a "Super Lite," an optional light Chrysler offered to provide additional visibility of its vehicles. FMVSS 108 required certain lights (not including Super Lite), and prohibited additional lights that "impair[ed] the effec-

FMVSS 208 grants options among restraint systems because Congress and the Department of Transportation judged that options, and not a single restraint system design, best met the safety goal. FMVSS 208 claims would, as the United States recently put it, "interfer[e] with that federally protected freedom of choice," would "conflict[] with Standard 208," and so are preempted. Brief for the United States as Amicus Curiae Supporting Respondents at 28-29, *Freightliner Corp. v. Myrick*, (No. 94-286) (filed Dec. 13, 1994). The FMVSS 208 options are the same, and the effect of a design defect claim that takes away one of those options is the same, whatever the injury a plaintiff may have sustained in an accident. Indeed, it is odd, at the least, to propose that a person with an abdominal injury may take away an FMVSS 208 option, while a person with a chest injury may not.[10]

FMVSS 208 preempts any state law claim that takes away one of its restraint system options. The particular injuries claimed in the state law action do not change that.

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tiveness of the required equipment." 419 F.2d at 505. Apart from that prohibition, FMVSS 108 had no provision that related to the Super Lite. The circuit court held that the state regulation, which prohibited lights that might blind oncoming drivers, did not conflict with FMVSS 108. *Id.* at 510. In contrast, FMVSS 208 specifically relates to occupant restraint and addresses automatic seat belt design; indeed, it specifically endorses the option to install 2-point belts "in place of" 3-point belts—the option plaintiff took away.

[10] Indeed, plaintiff's theory is ultimately nonsensical. For plaintiff essentially proposes that only people who claim injuries at the measurement points for FMVSS 208's performance criteria—head, chest and femur—face preemption. Thus, under plaintiff's theory, a person who injured one leg bone (say, the tibia) could punish the exercise of an FMVSS 208 option, but a person who injured a different leg bone (the femur) could not. And what of people who suffered multiple injuries? Obviously, statutes and regulations are construed to make sense, not nonsense. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982).

IV. PLAINTIFF'S FAILURE TO WARN THEORY FALLS ON THE SAME GROUNDS AS HER DEFECT THEORY.

Plaintiff says her warning claim is an independent basis for denying review. Opp. at 29. Plaintiff is mistaken.

First, the Florida District Court of Appeal did not find that a failure to warn claim, or any state law ground, was an independent basis for upholding the verdict against a preemption challenge. *Hyundai Motor Company (Korea) v. Phillip*, 639 So. 2d 1064 (Fla. Dist. Ct. App. 1994) (App. A-2). This Court will exercise jurisdiction where the lower court's decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Coleman v. Thompson*, 501 U.S. 722, 733, *reh'g denied*, 501 U.S. 1277 (1991). That is this case.

Second, there is no basis in Florida law for any such alternative ground. The absence of a warning is not actionable in Florida unless, without it, a product is defective. *American Motors Corp. v. Ellis*, 403 So. 2d 459, 466 (Fla. Dist. Ct. App. 1981) ("The fallacy of the warning argument . . begs the question. If there were a defect in the [product] that caused the injuries . . . , AMC is liable, irrespective of any failure to warn; if there were not, there is no liability irrespective of any failure to warn."), *rev. denied*, 415 So. 2d 1359 (Fla. 1982). Thus, if the defect theory is not actionable, as a matter of Florida law, the warning claim is not either.

Finally, plaintiff avoids the warning claim she made. She argued that Hyundai should have advised Ann Marie Phillip that "for complete protection you have to have a lap belt." (R. Tr. 1512) That punished the exercise of the 2-point belt option, exactly as her defect claim did. Thus, it would also "interfer[e] with [the] federally protected freedom of choice," would "conflict[] with Standard 208," and so is preempted. United States Brief in *Myrick* at 28. Plaintiff cannot "circumvent" preemp-

tion "by relying on a duty to warn theory of liability." *Pak v. Chrysler Motor Corp.*, 1990 WL 198821 at *2 (E.D. Pa. 1990), *aff'd*, 941 F.2d 1200 (3d Cir. 1991). *Cf. Schick v. Chrysler Corp.*, 675 F. Supp. 1183, 1186 (D.S.D. 1987) (cannot avoid preemption by "theoretical sleight of hand").

In sum, the failure to warn claim is not, as a matter of fact or law, an independent state law ground for the Florida decision.

CONCLUSION

The Court should grant review. At the least, the Court should hold this petition until *Myrick* is decided, and then either grant review and consider the case, or grant review, vacate the lower court's decision, and remand the case for reconsideration in light of *Myrick*.

Respectfully submitted,

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